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In the Supreme Court of the United States

OCTOBER TERM, 1980

UNITED STATES NUCLEAR REGULATORY COMMISSION and the UNITED STATES OF AMERICA, PETITIONERS

v.

STEVEN SHOLLY, ET AL.

METROPOLITAN EDISON COMPANY, ET AL., PETITIONERS

v.

PEOPLE AGAINST NUCLEAR ENERGY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AND THE UNITED STATES NUCLEAR REGULATORY COMMISSION

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QUESTION PRESENTED

Whether Section 189(a) of the Atomic Energy Act of 1954, 42 U.S.C. 2239(a), authorizes the Nuclear Regulatory Commission to amend an operating license for a nuclear power plant without first holding a hearing, if one has been requested, where the Commission determines that the amendment presents no significant hazards consideration.

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OPINION BELOW

The opinion of the court of appeals (80-1640 Pet. App. 1a-27a) and the Statement on Denial of Rehearing En Banc by dissenting members of the court (*id.* at 28a-46a) are not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on November 19, 1980 (80-1640 Pet. App. 47a-48a). Timely

petitions for rehearing and a suggestion for rehearing en banc were denied on March 4, 1981 (*id.* at 28a-46a; 80-1656 Pet. App. 19a). The petition for a writ of certiorari in No. 80-1640 was filed on March 30, 1981. The petition for a writ of certiorari in No. 80-1656 was filed on April 2, 1981. The petitions were granted on May 26, 1981. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTE INVOLVED

Section 189(a) of the Atomic Energy Act of 1954, 42 U.S.C. 2239(a), provides in pertinent part:

> In any proceeding under this Act, for the granting, suspending, revoking, or amending of any license or construction permit * * * the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding. The Commission shall hold a hearing after thirty days' notice and publication once in the Federal Register, on each application * * * for a construction permit for a facility * * *. In cases where such a construction permit has been issued following the holding of such a hearing, the Commission may, in the absence of a request therefor by any person whose interest may be affected, issue an operating license or an amendment to a construction permit or an amendment to an operating license without a hearing, but upon thirty days' notice and publication once in the Federal Register of its intent to do so. The Commission may dispense with such thirty days' notice and publication with respect to any application for an amendment to a construction permit or an amendment to an operating license upon a determination by the Commission that the amendment involves no significant hazards consideration.

STATEMENT

This case arose on consolidated petitions for review of two orders of the Nuclear Regulatory Commission, issued

June 12, 1980, pertaining to measures to be taken as part of the cleanup effort in the aftermath of the March 28, 1979, accident at Unit 2 of the Three Mile Island nuclear power plant in Pennsylvania (TMI-2). Specifically, the Commission issued (1) a "Memorandum and Order" (80-1640 Pet. App. 49a-61a) authorizing release of pent-up radioactive krypton-85 gas from the reactor containment building into the surrounding atmosphere and (2) an "Order for Temporary Modification of License" (*id.* at 62a-67a) which amended the TMI-2 operating license by temporarily replacing the existing limits on releases of radioactive gases with new limits expressed in terms of actual radiation dosages measured off the TMI-2 site, designed to allow more rapid venting of the gas, while providing health protection equivalent to that afforded by the former limits (*id.* at 6a-7a & nn.7, 8).

1. Following the accident at the TMI-2 nuclear power plant, the Nuclear Regulatory Commission ("NRC") undertook a series of regulatory actions and environmental studies to guide and control the cleanup process (see 80-1640 Pet. App. 3a-8a). One of the primary subjects addressed was an accumulation of radioactive krypton-85 gas in the containment building surrounding the reactor which inhibited maintenance and cleanup operations (*id.* at 3a). In accordance with a Commission Statement of Policy, issued November 21, 1979 (J.A. 36-38), requiring prior environmental review and an opportunity for public comment on all proposals for treating the radioactive gases in the containment building, alternative strategies for overcoming this problem were reviewed in a draft environmental assessment circulated for public comment commencing on March 25, 1980. See 45 Fed. Reg. 20265 (1980). The draft assessment endorsed a proposal that the accumulated gas be released to the surrounding atmosphere in a program of controlled dispersion, based upon the conclusion that the contemplated release entailed no significant adverse

health or environmental impacts, and, unlike the available alternatives, could be carried out without undue delay.[1] After consideration of extensive written and oral comments on the draft assessment and the alternative courses of action reviewed therein submitted by members of the public, the Commission issued a final environmental assessment which concluded that controlled venting of the krypton-85 gas to the atmosphere was the best solution available.[2] The NRC adopted and implemented that conclusion by issuing the June 12, 1980 "Memorandum and Order" and "Order for Temporary Modification of License" (80-1640 Pet. App. 49a-67a).

Prior to and during the completion of pertinent environmental review, the Commission took steps necessary to preserve the status quo. For instance, the release of certain radioactive gases, including krypton-85, is a normal part of the operation of a nuclear power reactor. The operating licenses of all nuclear power plants, including TMI-2, make provision for such releases. In response to the March 1979 accident at TMI-2, however, the Commission suspended the licensee's authority to operate TMI-2 and required that the plant be shut down. 44 Fed. Reg. 45271 (1979). And on February 11, 1980, the Commission implemented its November 21, 1979, Statement of Policy mandating an opportunity for environmental review and responsive public comment by

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[1] While the venting alternative could be carried out in a matter of days, the NRC staff found that technically feasible alternatives would require approximately a year to complete (No. 80-1640 Pet. App. 56a).

[2] The Commission received some 800 written comments from the public regarding the draft assessment. The Commission also conducted more than a score of public meetings to provide information about the purging proposal and solicit the views of concerned individuals and organizations. State and local government agencies, as well as prestigious scientific organizations, availed themselves of the opportunity to be heard. Final Environmental Assessment for Decontamination of the Three Mile Island Unit 2 Reactor Building Atmosphere, NUREG-0662, May 1980, ch. 10; 80-1640 Pet. App. 50a.

expressly prohibiting purging of the accumulated krypton gas pending further order of the Commission. 45 Fed. Reg. 11282. The June 12 "Memorandum and Order" authorizing venting ("the venting order") provided the necessary approval based upon the intervening environmental review, and the Commission's conclusion that the purging operation could be implemented consistent with its statutory mandate to protect the health and safety of the public (80-1640 Pet. App. 57a-58a). Under the order, venting was not to begin for at least 10 days so as to allow anyone who wished to leave the vicinity an opportunity to do so (*id.* at 58a).

The "Order for Temporary Modification of License" also issued by the Commission on June 12, 1980, made a change in the technical specifications of the TMI-2 operating license altering the standards governing the permissible rate of release of the krypton gas.[3] The limits in the TMI-2 license prior to June 12, like those of other nuclear power plant operating licenses issued by the Commission, were stated in terms of "activities," *i.e.*, the aggregate number of atomic disintegrations per second in the materials discharged. Although the potential for off-site health effects is more directly related to radioactivity dosages than activity levels, such dosages are not ordinarily measured on a regular basis. They accordingly are not employed in license specifications. Instead, as stated above, licensing limits are set in terms of activity limits which can be readily and continuously monitored on site and which are calculated to

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[3] The Order for Temporary Modification of License did not in itself authorize any release of krypton, for that was already permitted under the TMI-2 license, subject to the suspension imposed on February 11, 1980, lifted by the June 12 "Memorandum and Order." On the other hand, the Memorandum and Order, unlike the Order for Temporary Modification of License, made no change in the rate of venting permitted.

ensure that off-site dosages remain at safe levels.[4] Following the TMI-2 accident, "an extensive environmental monitoring network * * * in the Three Mile Island area * * * capable of producing prompt and frequent off-site dose measurements" was established which made it feasible to set license release limits directly in terms of the radiation doses that might be caused by the krypton-85 releases during venting (80-1640 Pet. App. 64a). This substitution was made by the Commission in order to permit somewhat speedier purging of the containment building, based upon the findings that "the new limits will not be inimical to public health and safety" (*ibid.*).

No hearing specifically devoted to either of the orders issued on June 12 was held by the Commission prior to their issuance.[5] The Commission believed that no hearing was required as to the Memorandum and Order authorizing commencement of venting because, as is explained above, that order merely restored pre-existing license authority, originally granted after a hearing, that had been suspended, but not revoked, following the TMI-2 accident, and accordingly did not constitute an amendment to the TMI-2 operating license, subject to the hearing provisions of Section 189(a) of the Atomic Energy Act, 42 U.S.C. 2239(a). However, as its caption indicates, the other order affecting the TMI-2 cleanup issued by the Commission on June 12, the "Order for Temporary Modification of License," was treated as an amendment to the TMI-2 operating license by the Commission. Here, however, the Commission found that the recasting of the technical license specifications concerning release of radioactive gases in terms based directly on dosages measured off the plant site in place

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[4] The relationship between radiation released and off-site dosages depends upon weather conditions and assumptions about the pattern of distribution of released materials. Release limits are set so as to ensure that unacceptable doses will not occur off site in any location, whatever the weather conditions.

[5] But see note 2, *supra*, and accompanying text.

of the activity standard designed to achieve the same level of protection "involve[d] no significant hazards consideration" (80-1640 Pet. App. 65a). This finding, the Commission believed, made it unnecessary to grant a hearing prior to issuance of the license amendment. Accordingly, while noting that any interested person affected by the "Order for Temporary Modification of License" could request a hearing thereon pursuant to 10 C.F.R. 2.714 within thirty days, the Commission provided that the license amendment be effective immediately and that "[a] request for hearing will not stay the effectiveness of this order" (80-1640 Pet. App. 66a).

2. During the ten-day interval before the venting order took effect, respondents Sholly and People Against Nuclear Energy, along with one other group, requested, on June 16, that the Commission reconsider its June 12 orders, the finding of "no significant hazards consideration" respecting the change in the TMI-2 license release limits, and the decision to make the orders effective prior to an opportunity for a public hearing. On June 23, 1980, respondents Sholly and Hossler filed a petition for review of the two June 12 orders in the court of appeals. On June 26, 1980, the court of appeals denied an application for an emergency injunction to forestall commencement of venting (80-1640 Pet. App. 3a, 7a). That same day, the Commission, which had received the request for reconsideration on June 23 (J.A. 56) denied the request (*id.* at 55-60). The Commission noted errors in a study submitted to support the reconsideration request, and found that the request "presents no reason to alter the Commission's key determination that the proposed purging of the TMI-2 containment will have a negligible impact on physical health" (*id.* at 59).[6] On June 27 re-

[6] With regard to its "no significant hazards consideration" finding and petitioner's request for hearings prior to implementation of the license modification involved and the separate venting order, the Commission stated (J.A. 59-60; footnote omitted):

> [T]he Joint Motion criticized our finding that the temporary license modification involves "no significant hazards considera-

spondents lodged a request for a hearing on the two June 12 orders with the Commission. That request was referred to an Atomic Safety and Licensing Board ("ASLB") pursuant to 42 U.S.C. 2241 (80-1640 Pet. App. 7a). On June 28, venting actually began at the pace allowed by the TMI-2 license prior to the June 12 amendment. Only on July 8 did the licensee commence venting at the faster pace allowed by the amendment.

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tion" and therefore may be made immediately effective. We believe the joint petitioners have misunderstood the scope of this finding, which pertains only to the question whether changing the TMI-2 specifications from release limits to dose limits involves a significant hazards consideration. The dose limits aim at achieving the same level of protection of public health and safety and, in fact, do so more directly, since it is the associated dose rather than the radioactive releases themselves which are the focus of concern. Accordingly, the Commission reaffirms its determination that the temporary license modification involves no significant hazards consideration and may therefore be made effective immediately.

With regard to purging itself, the unmodified technical specifications which allow for purging were adopted as part of the licensing proceeding for TMI-2 after full opportunity for a public hearing. There has been extensive public participation in the purging decision through public meetings and comments on the environmental assessment. There has thus been ample opportunity for members of the public to raise any issue which might have been brought up in an adjudicatory hearing and to present evidence contradictory to the positions of the NRC staff or Metropolitan Edison. The joint petitioners complain that there has been no public hearing specifically devoted to purging, but they have not indicated that any relevant evidence exists which they have somehow been prevented from bringing to the Commission's attention. Accordingly, since the procedures by which the Commission's orders were developed met the requirements of the Atomic Energy Act and have provided for a thorough consideration of the issues, we reject the suggestion that these orders should be withdrawn on procedural grounds.

On July 3, respondents had moved the ASLB to suspend venting, but they withdrew that request on July 8. The purging process was completed on July 11, 1980. Off-site doses measured never reached the limits set in the June 12 license amendment (80-1640 Pet. App. 7a-8a).

3. Proceedings continued in the court of appeals.[7] The respondents there argued that: (1) the venting order improperly authorized venting of krypton to the atmosphere, (2) the Commission's decision that the license modification order entailed no significant safety questions was arbitrary, and (3) each of these orders had been issued without a prior hearing in violation of Section 189(a) of the Atomic Energy Act, 42 U.S.C. 2239(a). In response, the Commission and intervenors, TMI-2 licensees Metropolitan Edison Co., *et al.*, argued that: (1) the petitions for review had been mooted by completion of the venting process and the expiration of the June 12 orders, there being little likelihood of repetition of the need for extraordinary venting at TMI-2, (2) the venting order was reasonable, consistent with applicable Commission regulations, and was not an amendment to the TMI-2 operating license, and (3) the temporary license modification had properly been determined to involve "no significant hazards consideration," and was properly issued without offering or holding a prior hearing or giving prior notice of the action in the Federal Register, under the authority conferred by the last sentence of Section 189(a).[8]

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[7] A separate petition for review and an accompanying petition for a writ of mandamus were filed in the Third Circuit by respondent People Against Nuclear Energy on July 8, 1980, and were transferred to the D.C. Circuit and consolidated with the petition first filed there, by respondents Sholly and Hossler.

[8] The United States, separately joined and represented as a respondent in the court of appeals pursuant to 42 U.S.C. 2239(b), 28 U.S.C. 2342(4), 28 U.S.C. 2344, and 28 U.S.C. 2348, argued that the question whether Section 189(a) permits the NRC to dispense with a prior hearing where the Commission determines

Concluding that respondents' challenge to the Commission's authority to issue a license amendment found to entail "no significant hazards consideration" without allowing an opportunity for a prior hearing was not moot, the court of appeals reversed.[9] The court held that the final sentence of Section 189(a) of the Atomic Energy Act does not permit the Commission to dispense with a hearing prior to approval of a license amendment, even when the Commission determines that the amendment presents no significant hazards consideration. Rather, in the court's view, the provision in question authorizes only omission of some form of notice where a "no significant hazards consideration determination" is reached by the

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that a license amendment entails "no significant hazards consideration" was capable of repetition, but would not generally evade review, and that this case was therefore moot. In addition, the United States suggested that the petitioners' withdrawal of their request for suspension of purging rendered the case moot. However, the United States suggested that the last sentence of Section 189(a) does not permit the Commission to dispense with a hearing prior to approval of a license amendment if one is properly sought in a timely manner, notwithstanding a determination that "no significant hazards consideration" is presented by an amendment. The United States noted that there was some question whether a hearing had actually been requested in a timely manner here.

As is explained in the petition for certiorari (80-1640 Pet. 7 n.4), the United States has reconsidered its position and now joins the Nuclear Regulatory Commission in urging reversal of the judgment of the court of appeals.

[9] The court of appeals rejected the petitioners' contentions that this case was moot (80-1640 Pet. App. 8a-13a), concluding that the issue presented was "capable of repetition, yet evading review" (*id.* at 9a) and that the respondents' withdrawal of their request for a stay of venting (see page 9 & note 8, *supra*) did not prevent adjudication (80-1640 Pet. App. 26a n.28). The court of appeals also held, essentially *sua sponte* (but see note 8, *supra*), that the respondents' informal expressions of opposition to the venting plan constituted a timely request for a hearing prior to approval of any amendment to the TMI-2 license facilitating venting sufficient to trigger their statutory hearing rights under Section 189(a) (80-1640 Pet. App. 21a n.25).

Commission (80-1640 Pet. App. 13a-22a). Concluding, as well, that the June 12 venting order was a license amendment subject to Section 189(a) (*id.* at 23a-25a), the court declared that NRC had been required to hold a hearing prior to issuance of either the venting order or the temporary license modification order (*id.* at 26a).

In support of its interpretation of the concluding sentence of Section 189(a), the court of appeals relied upon language in *Brooks* v. *Atomic Energy Commission*, 476 F.2d 924, 927 (D.C. Cir. 1973), which the court regarded as settling the issue, while branding a contrary statement in *Union of Concerned Scientists* v. *Atomic Energy Commission*, 499 F.2d 1069, 1084 n.36 (D.C. Cir. 1974), unconsidered *dictum* (80-1640 Pet. App. 15a-16a & n.18). Alternatively, the court of appeals held (*id.* at 16a):

> The plain language of section 189(a) dispels any notion that by a finding of "no significant hazards consideration" the NRC may dispense with the hearing requirement. The fourth sentence [of Section 189(a)] makes no mention of the hearing requirement's being lessened, but makes reference only to the requirements of notice and publication.

The court of appeals also discerned support for its interpretation of Section 189(a) in passages from the legislative history of the 1962 amendments to the Atomic Energy Act that added the penultimate sentence of that provision, while contrary legislative history stressed by the Commission was discounted (80-1640 Pet. App. 17a-22a). Finally, the court rejected the suggestion that deference was due to the Commission's interpretation of the statute under which it operates, stating that the statutory text was irreconcilable with the Commission's position and accordingly did not allow room for such deference (*id.* at 21a-22a n.26).

The Commission and the intervenors petitioned the court of appeals for rehearing, with the intervenors suggesting en banc consideration. The petitions and suggestion were rejected on March 4, 1981 (80-1656 Pet.

App. 1a, 19a).[10] Four members of the court would have granted rehearing en banc. They filed a dissenting statement urging reconsideration of the panel's holding that the Commission may not dispense with an opportunity for a hearing prior to granting an amendment to a nuclear power plant operating license upon determining that the contemplated amendment entails no significant hazards consideration (80-1640 Pet. App. 30a & n.1). Likening the practice required by the panel decision to the kind of extra-statutory judicial "procedural imposition" condemned in *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 543-548 (1978) (80-1640 Pet. App. 31a, 44a-46a), the dissenting judges concluded that the Commission's practice "complied fully with statutory mandates" (*id.* at 34a). The dissenters added that "the confusion inherent within" the legislative history of the 1962 amendments to Section 189(a) "concede[d by the panel] to be 'replete with ambiguities and inconsistencies'" was "alone sufficient reason why [that legislative history] should not have been cited selectively in support of the panel's sweeping rule" (*id.* at 38a, quoting 20a n.24).

SUMMARY OF ARGUMENT

In enacting the 1962 amendments to the Atomic Energy Act of 1954, Congress added language to Section 189(a) of the Act, 42 U.S.C. 2239(a), which governs hearings on applications for licenses under the Act. In pertinent part, the new provision is as follows:

> The Commission may dispense with such thirty days' notice and publication with respect to any application for an amendment to a construction permit or an amendment to an operating license upon a deter-

[10] The court of appeals stayed issuance of its mandate for a period of thirty days from the date of denial of rehearing pending filing of the Commission's petition for a writ of certiorari. Pursuant to Fed. R. App. P. 41(b), the effect of the court of appeals' decision remains in suspense until final disposition of this case by this Court.

> mination by the Commission that the amendment involves no significant hazards consideration.

This amendment was the culmination of a process of intensive congressional oversight and administrative innovation over a period of several years through which the Commission had developed procedures for handling of routine license amendments entailing no novel safety issues without requiring a public hearing prior to Commission action.

Shortly before Congress enacted the 1962 amendments, the Commission had promulgated regulations, 10 C.F.R. 50.59(e)(2) (1963) (27 Fed. Reg. 5493 (1962)), providing:

> If the Commission determines that the proposed change * * * does not present significant hazards considerations * * * it may authorize such change * * * without a prior public hearing * * *.

The legislative history of the 1962 amendments to the Atomic Energy Act demonstrates that by adding the language to Section 189(a) quoted above—the fourth sentence of that section—Congress intended to adopt the Commission's regulation. Indeed, the Report of the Joint Committee on Atomic Energy notes that the standard written into the statute "is presently being applied by the Commission under the terms of AEC Regulation 50.59" (S. Rep. No. 1677, 87th Cong., 2d Sess. 8 (1962); H.R. Rep. No. 1966, 87th Cong., 2d Sess. 8 (1962)). Thus, Congress expressly approved the Commission's assertion of authority to omit hearings prior to acting upon amendments which entail no significant hazards consideration.

The court of appeals erred in suggesting that the sole purpose of the 1962 amendment to Section 189(a) was to relieve the Commission of the obligation, imposed by earlier 1957 amendments to Section 189(a), to hold hearings—whether requested by interested parties or not—on issuance of operating licenses, and amendments to such licenses and to construction permits for nuclear power facilities. To be sure, Congress *did* relax the mandatory

hearing procedure. But that change was effectuated through amendment of the second sentence and the addition of the third sentence of Section 189(a). The addition of the *fourth* sentence of Section 189(a)—the critical provision for present purposes—had a discrete objective: to authorize the Commission to dispense with hearings on amendments involving "no significant hazards consideration."

The court of appeals incorrectly assumed that the result it reached is required by the "plain language" of Section 189(a). On the contrary, although the last sentence of Section 189(a) does not expressly mention hearings, read in context it does authorize the omission of notice and publication *of the Commission's intention to act without a hearing*. Under the circumstances, it is plain that Congress intended to allow the Commission to dispense with a hearing when routine amendments are considered. As the court below acknowledged, its decision creates a paradox; the court assumed that Section 189(a) allows the Commission to omit all public notice of routine amendments, but still requires that a hearing be held if someone somehow manages to learn of Commission proceedings in a timely fashion. Such an anomalous procedural rule should not lightly be ascribed to Congress.

Any ambiguity in Section 189(a) calls for deference to the Commission's long-standing interpretation of the statute under which it has operated from its inception. That is particularly appropriate here because of the evolution of the Commission's interpretation under close and regular congressional scrutiny. Special deference is also warranted because the court of appeals' interpretation of Section 189(a) carries the potential to frustrate the purposes of the Atomic Energy Act by thrusting novel and substantial administrative burdens onto the Commission, which could threaten the viability of the existing system of regulation of nuclear power production, the production of nuclear power itself, or both.

ARGUMENT

THE COMMISSION'S PROCEDURES POSTPONING ANY OPPORTUNITY FOR A HEARING UPON LICENSE AMENDMENTS FOUND TO ENTAIL NO SIGNIFICANT HAZARDS CONSIDERATION UNTIL AFTER INITIAL ACTION APPROVING THE AMENDMENT ARE CONSISTENT WITH THE REQUIREMENTS OF THE ATOMIC ENERGY ACT OF 1954

The court of appeals has, in this case, rejected a federal agency's long-standing reasonable and workable interpretation of a key provision of the statute under which it operates and disregarded the regulations which implement that interpretation. Yet Section 189(a) of the Atomic Energy Act, and the Commission's regulations and procedures thereunder, are the product of careful consideration by Congress: an evolutionary process entailing enactment of perfecting amendments on two separate occasions and continuous congressional oversight. Congress has ensured that the Commission's regulatory practice complies with the statutory mandate and has designed a system of regulation of the private nuclear power industry which is sufficiently detailed to ensure protection of public health and safety, and at the same time, sufficiently flexible to avoid proliferation of sterile and time-consuming proceedings which do not contribute to that overriding goal. The decision below upsets this vital balance and frustrates the expressed intentions of Congress. If permitted to stand, the court of appeals' decision could force a radical alteration in the Commission's regulatory practices, and may necessitate curtailment of nuclear power plant operations for reasons unrelated to any safety question concerning nuclear power.

1. An understanding of the procedural requirements of Section 189(a) pertaining to issuance of amendments to nuclear power plant operating licenses must begin with a review of the provisions of Section 189(a) as originally enacted, the amendments enacted in 1957 and

1962, the Commission's evolving practices and regulations thereunder, and the ongoing oversight process by the Joint Committee on Atomic Energy (JCAE). See 42 U.S.C. 2252; *Power Reactor Co.* v. *Electricians*, 367 U.S. 396, 408-409 (1961).[11]

a. In the Atomic Energy Act of 1954, Congress for the first time authorized private ownership and operation of nuclear reactors, providing, however, for regulation by the Atomic Energy Commission (AEC), predecessor to the present Nuclear Regulatory Commission. Actions by the Commission were subjected to the Administrative Procedure Act (see Section 181, 42 U.S.C. 2231),[12] and public notice and hearing requirements were provided for in Section 189(a) of the Act.[13] As originally enacted, Section 189(a), 42 U.S.C. (1952 ed., Supp. III) 2239(a), consisted of a single sentence providing, in pertinent part:

> In any proceeding under this Act, for the granting, suspending, revoking, or amending of any license or construction permit * * * the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding.

Thus, the Commission was not required to hold a hearing on an application to construct or operate a power reactor

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[11] Section 202 of the Atomic Energy Act of 1954, 42 U.S.C. 2252, which set out the authority and duties of the Joint Committee, was repealed by Section 1 of Pub. L. No. 95-110, 91 Stat. 884, in 1977, and the Committee itself was abolished. See 42 U.S.C. (Supp. III) 2258(a). The Commission was directed thenceforth to keep the committees of the House and Senate upon which oversight duties devolved "fully and currently informed with respect to * * * [its] activities." 42 U.S.C. (Supp. III) 2259(a).

[12] This provision remains in effect as 42 U.S.C. 2231.

[13] The process for licensing construction and operation of commercial nuclear power reactors is described in *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 525-527 (1978).

or any amendment to such a construction permit or operating license unless an interested party requested one. On the other hand, no special provision was made for handling of routine matters not involving health or safety issues.

A controversy concerning the Commission's practice under the 1954 version of Section 189(a) prompted amendments to the Act in 1957. In January 1956, the Power Reactor Development Company had applied to the Commission for a permit to construct a new kind of reactor near Lagoona Beach, Michigan. The Commission had issued a conditional construction permit without advance notice of its intent to do so, and without holding any prior public hearing, but allowed timely after-the-fact intervention by parties opposed to continuation of the conditional permit, and held hearings on their applications to revoke the permit.[14] The Commission ultimately upheld the construction permit against

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[14] At the time the AEC's rules of practice provided, 10 C.F.R. 2.102 (1956) (21 Fed. Reg. 805 (1956)):

> (a) The AEC will, upon request of the applicant or an intervenor, and may upon its own initiative, direct the holding of a formal hearing prior to taking action on the application. If no prior formal hearing has been held and no notice of proposed action has been served as provided in paragraph (b) of this section, AEC will direct the holding of a formal hearing upon receipt of a request therefor from the applicant or an intervenor within 30 days after the issuance of a license or other approval or a notice of denial.
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> (b) In such cases as it deems appropriate, AEC may cause to be served upon the applicant, and published, a notice of proposed action upon his application and shall cause copies thereof to be served upon intervenors or others entitled to or requesting notification. The notice shall state the terms of the proposed action. If a formal hearing has not been held prior to issuance of the notice, AEC will direct the holding of a formal hearing upon the request of the applicant or an intervenor received within fifteen days following the service of the notice.

The Commission acted under the second sentence of 10 C.F.R. 2.102(a) (1956) in the Power Reactor Development Company proceeding.

the challenges lodged by intervenors. Construction continued throughout the Commission proceedings. See *Power Reactor Co.* v. *Electricians*, *supra*, 367 U.S. at 399-403;[15] Staff of the Joint Comm. on Atomic Energy, 87th Cong., 1st Sess., *Improving the AEC Regulatory Process*, Vol. I, 27-28 (Comm. Print 1961).

There was sharp congressional criticism of the AEC's conduct in the *Power Reactor* case. Among other things, the Commission was faulted for failing to hold a public hearing on the construction permit in advance of issuance of the construction permit. See *Improving the AEC Regulatory Process*, *supra*, Vol. I at 30; Staff of the Joint Comm. on Atomic Energy, 85th Cong., 1st Sess., *A Study of AEC Procedures and Organization in the Licensing of Reactor Facilities* 1, 8, 9, 110, 125-126, 197 (Comm. Print 1957).[16] In response to this criticism, the Commission modified its practices to ensure either that public hearings were held without waiting for a request, in advance of approval of reactor construction permits and operating licenses or any substantial amendments thereto, or that sufficient notice of the pendency of such licenses and amendments and the underlying issue was provided to the public to enable any interested party to request a hearing.[17] In September 1957, Con-

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[15] In *Power Reactor Co.* v. *Electricians*, which arose on petitions for review of the AEC's final order, this Court upheld the Commission's two-stage licensing procedure for nuclear power plants, under which a conclusive finding as to safety of the plant in operation was deferred to the point at which an application for an operating license is considered, rather than addressing this matter exhaustively at the time a construction permit is issued. No challenge to the postponement of the opportunity for a hearing until after the issuance of the conditional construction permit was raised by the parties or considered by the Court. 367 U.S. at 403.

[16] The primary object of congressional criticism, however, was the Commission's failure to release to the public a report by the Advisory Committee on Reactor Safeguards (ACRS) questioning the adequacy of the information available to the Commission to assess the safety of the proposed facility in operation.

[17] Letter from AEC Chairman Lewis L. Strauss to Senator Clinton P. Anderson, Chairman of the Joint Committee on Atomic

gress, acting on the recommendation of the Joint Committee on Atomic Energy, amended Section 189(a), *inter alia*, to prevent repetition of what had occurred in *Power Reactor Co.*, by adding the following sentence:

> The Commission shall hold a hearing after thirty days notice and publication once in the Federal Register on each application * * * [for a construction permit or operating license] for a facility * * *.

Atomic Energy Act Amendments of 1957, Pub. L. No. 85-256, Section 7, 71 Stat. 579. The language added made plain the Commission's obligation to hold public hearings, after appropriate notice, on applications for new construction permits and operating licenses, but did not address license amendments. Evidently uncertain as to the effect of the 1957 statutory amendments on procedures governing license amendments, especially those regarded as routine, the Commission began to hold hearings on such matters, whether or not requested by any intervening party. See *Improving the AEC Regulatory Process*, *supra*, Vol. I at 31-35.

b. As the Commission adopted more formal practices, including routine injection of formal public hearings at additional junctures in the regulatory process, it began to encounter criticism from Congress for overreacting to the 1957 amendments of the Atomic Energy Act. It was suggested that the AEC was unnecessarily holding hearings on license amendment applications where

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Energy (Jan. 4, 1957), reprinted in *A Study of AEC Procedures and Organization in the Licensing of Reactor Facilities*, *supra*, at 110. Commission Chairman Strauss stated (*ibid.*; Committee's emphasis deleted):

> In order to insure that the public is adequately informed, the Commission has modified its practices with regard to processing applications for the issuance of construction permits and facility licenses on substantial modifications thereof. The Commission will in such cases either order a hearing to be held or issue a notice of intent to issue.

In other words, the Commission proposed to act under the first sentence of 10 C.F.R. 2.102(a) (1956) or under 10 C.F.R. 2.102(b) (1956) in such cases. See note 14, *supra*.

no intervenor had requested a hearing, as well as where no substantial safety question was involved. See *Improving the AEC Regulatory Process, supra*, Vol. I at vii, 31, 49-52, Vol. II at 580. This report, prepared by the staff of the Joint Committee on Atomic Energy as part of the oversight process (see 42 U.S.C. 2252), stated (*Improving the AEC Regulatory Process, supra*, Vol. I at 52):

> Experience with the licensing of facilities demonstrates that frequent alterations in a construction permit will often be necessary after the permit has been issued. The same thing is true of operating licenses for experimental and test reactors and, to a less degree, of operating licenses for power reactors. An advancing art will usually require that changes be made in the technical specifications of a reactor as its construction progresses and as operating experience accumulates. Since these technical specifications must be incorporated in the reactor license, minor changes in them constitute, in a formal sense, amendment to the license. This has led to burdensome proceedings as exemplified in the *Vallecitos* and *Yankee* cases. The Commission has mitigated the problem by allowing technical specifications to be rewritten so as to eliminate some matters of detail, but this process could be carried to a point where the protective value of having the specifications in the license would be largely lost. Clearly there is need for some more discriminating way to differentiate between those changes which require the same review as the initial permit or operating license would entail, and those which do not raise sufficiently significant issues of safety to justify such time-consuming proceedings.

Stressing the Commission's "[o]verdependence on formal hearings" (*id.* at 49), the Committee staff noted that the:

> merits of the formal hearing rapidly encounter the law of diminishing returns as successive hearings are held to pass either on proposed amendments to the construction permit or on the operating

> license. Only occasionally will the matter at issue justify the time-consuming, expensive business of preparing testimony and finding an opportunity to fit its presentation into the schedule of a busy hearing examiner. When no substantial safety question is involved in the conversion of a construction permit to an operating license or the amendment of either in some particular, the public interest would be protected by the filing of the proposed action in the Public Document Room, the publication of an apt notice in the Federal Register and the giving of an opportunity to any interested party to intervene with respect to any new matter raised by the action.

Id. at 49-50.[18]

By the time the Joint Committee's 1961 staff report was released, however, the Commission had begun to evolve procedures to deal more expeditiously with routine license amendments. In *General Electric Co.* (*Vallecitos Boiling Water Reactor*), 1 A.E.C. 541 (1960), the Commission issued an amendment to an operating license for a nuclear facility which specified that the Director of the

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[18] In the letter of transmittal covering this report, James T. Ramey, Executive Director of the Joint Committee noted (*id.* at viii):

> With respect to the hearings themselves, the Commission with some justice can point out that it was the Joint Committee and the Congress which instituted the mandatory hearing procedure. However, as this report indicates, the Commission has gone further in some respects than the law required, particularly in regard to the number of hearings required and the formality of procedures. The intent of the 1957 staff report was that AEC safety proceedings should be public and on the record. It would appear that the Commission has utilized the hearing process to extend the Commission's affirmative control over licensing to include startup operations and changes. While such control may be desirable, it might be accomplished without unnecessary hearings, but on the public record, with a later opportunity for hearing in the event of exceptions filed by any party or intervention.

The staff report also suggested (*id.* at 31) that the *Power Reactor* case "has resulted in the Commission leaning backward in establishing legal procedures which in some respects go further than the statutory requirements."

Commission's Division of Licensing and Regulation was empowered to authorize future changes in the licensee's operations entailing an alteration in the technical specifications of the license, without holding a public hearing, when the Director "determines that the proposed * * * [amendment] does not present significant hazards considerations not described or implicit in the application * * * [for the underlying license] upon finding that there is reasonable assurance that the health and safety of the public will not be endangered" (*id.* at 543).[19] This innovation was noted in the 1961 JCAE staff report, which quoted the applicable portions of the Commission's memorandum decision approving the *Vallecitos* license amendment (see note 19, *supra*).

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[19] The license amendment also provided guidance as to procedures applicable when a licensee wished to take action to change its facilities or procedures, or to conduct experiments, which did not require changes in its license specifications but which nonetheless involved "an unreviewed safety question" (*id.* at 541). Under the *Vallecitos* decision such actions, like license amendments, required Commission approval after a public hearing unless determined to present "no significant hazards consideration" not previously addressed. The effect of the provisions of the *Vallecitos* license amendment announcing these procedures (reported in pertinent part in *General Electric Co., supra*, 1 A.E.C. at 543), was summarized by the Commission in its "Memorandum and Order" as follows (*id.* at 541):

> The license * * * makes it clear GE has complete freedom to make changes within the parameters of the technical specifications, provided no unreviewed safety question is involved. The Licensee has no authority to proceed with changes in doubtful cases. All questions of doubt must be resolved by referring the proposed change to the Division of Licensing and Regulation. If the Director, Division of Licensing and Regulation, can make a finding that the proposed test or experiment presents no significant new hazards considerations, he may proceed to authorize the change. A copy of the finding and change authorization shall be filed in the public record. If the Director, Division of Licensing and Regulation, finds there is a significant new hazard consideration, he will refer the request to the Advisory Committee on Reactor Safeguards and schedule it for hearing in accordance with applicable procedures.

The report accurately stated the effect of the amendment, and suggested further innovation along the same lines:

> [T]he Commission permitted a redrafting of the technical specifications to eliminate unnecessary details, thus granting the licensee greater freedom of operations, *and permitting the staff to determine which cases might be approved at the staff level, and which required A[dvisory] C[ommittee on] R[eactor] S[afeguards] review and a public hearing.* The Commission's * * * solution * * * represented a step forward, although further consideration should be given to the possibility of approval of important changes by notice of proposed action, rather than a public hearing.

Improving the AEC Regulatory Process, supra, Vol. I at 37 (emphasis added). The staff report suggested that the Commission's operations would be improved if the Commission exercised increased discretion as to the need for public hearings on minor license amendments, by adopting the *Vallecitos* procedures as standard operating procedure (*id.* at 73 & n.4; emphasis added):

> Changes in a reactor's design or mode of operation involving changes in technical specifications and hence entailing changes in the construction permit or license should, if approved by the AEC staff, be submitted to the [proposed Atomic Safety and Licensing] Board to determine whether a hearing should be held to consider them.[4] If the Board concludes that no hearing is necessary, it should issue a notice of its proposed decision for publication in the Federal Register, to be effective no less than a specified period after publication.

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[4] At present technical specifications are required by the Atomic Energy Act of 1954 (§ 182) to be a part of the license. These have inculded many details of no importance from the safety standpoint. The handling of changes would be facilitated if the Commission's recent order in the *Vallecitos* case, could be broadened by statute or regulation to a general

> rule. This order incorporates in the license only those technical specifications and operating parameters which have special significance for safety. * * * *This area is one in which considerable clarification could be achieved over a period of time through rules issued by the Board to govern the question of when proposed changes should be submitted to it to determine whether a hearing should be held.*

Shortly after publication of the JCAE staff report in March, 1961, the AEC, on April 8, promulgated a proposed rule giving the procedures developed in the *Vallecitos* proceeding general applicability, providing an opportunity for public comment thereon. 26 Fed. Reg. 3030, 3031 (1961). In the introductory commentary, the Commission summarized the effect of the proposed regulation (*id.* at 3030):

> the Commission may authorize a proposed change, test or experiment upon determining that it does not involve significant hazards considerations not described or implicit in the hazard [*sic*] summary report and upon finding that there is reasonable assurance that the public health and safety would not be endangered.[20]

After consideration of comments received in response to the April 1961 draft, the Commission promulgated a final rule, 10 C.F.R. 50.59 (1963), on June 9, 1962, providing in pertinent part (27 Fed. Reg. 5493; J.A. 25):

> (e) With respect to request [*sic*] for changes, tests, or experiments or for changes in technical specifications * * *:
>
> (1) If the Commission determines that the proposed change, test or experiment presents significant hazards considerations not described or implicit in the hazards summary report it will refer the request to the Ad-

[20] A hazards summary report was the report submitted by the licensee for evaluation by the Commission of health and safety considerations when application is made for a construction permit or operating license. 10 C.F.R. 50.34 (1963). This document is now known as the "Safety Analysis Report." 10 C.F.R. 50.34(a), (b).

visory Committee on Reactor Safeguards and will order a public hearing in accordance with applicable procedures. * * *

(2) If the Commission determines that the proposed change, test or experiment does not present significant hazards considerations not described or implicit in the hazards summary report, it may authorize such change, test or experiment, without referral to the Advisory Committee on Reactor Safeguards for a report and without a prior public hearing, upon finding that there is reasonable assurance that the health and safety of the public will not be endangered.

c. Although the *Vallecitos* decision and its subsequent codification at 10 C.F.R. 50.59 (1963) gave the AEC the means to process efficiently minor license amendments for power reactors, the Commission still bore the burden, imposed by the 1957 amendment to Section 189(a), of conducting public hearings at both the construction permit and the operating license phases of a power reactor licensing proceeding, whether or not the application was contested. Moreover, the Commission believed itself obliged to hold mandatory hearings on significant license amendments. These matters and the recommendations of the JCAE staff were reviewed during oversight hearings conducted by the JCAE in June 1961. See *Radiation Safety and Regulation: Hearings Before the Joint Comm. on Atomic Energy*, 87th Cong., 1st Sess. (1961).[21] On Au-

[21] The AEC's and JCAE's divergent interpretations of the Commission's obligations respecting significant license amendments were aired in a colloquy between Commissioner Olson and JCAE Chairman Holifield during the 1961 hearings (*id.* at 303-304). In response to a suggestion that the Commission was holding hearings the 1957 amendments did not require, Commissioner Olson replied (*ibid.*).

MR. OLSON. * * * In my firm legal opinion we followed the law. In view of the history of these amendments, I don't

gust 15, 1961, JCAE Chairman, Representative Holifield, and Vice Chairman, Senator Pastore, introduced identical bills incorporating the JCAE staff's suggestions for improvements in the AEC regulatory process. H.R. 8708, 87th Cong., 1st Sess. (1961) (107 Cong. Rec. 15879 (1961)); S. 2419, 87th Cong., 1st Sess. (1961) (107 Cong. Rec. 15882 (1961)). Both bills were referred to the Joint Committee on Atomic Energy, which deferred action pending further study. Similar bills were introduced in the next session of Congress. H.R. 12336, 87th Cong., 2d Sess. (1962) (108 Cong. Rec. 11977 (1962)); S. 3491, 87th Cong., 2d Sess. (1962) (108 Cong. Rec. 12235 (1962)).

Additional hearings were held on April 17, 1962. *AEC Regulatory Problems: Hearing on H.R. 12336 and S. 3491 Before the Subcomm. on Legislation of the Joint Comm. on Atomic Energy*, 87th Cong., 2d Sess. (1962) (*1962 Hearing*). Senator Pastore opened the 1962 hearings by posing the question: "Is the AEC procedure still too cumbersome in considering proposed minor changes to operating reactors when no significant safety questions are presented?" *Id.* at 1. Commissioner Olson of the AEC responded noting, *inter alia*, the then-proposed amendments to 10 C.F.R. Part 50 (1963) governing routine

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think we would have been authorized to take much license with interpretation of this section. The proper place to get interpretation of language of this sort is before the Congress. As I have indicated, we would now recommend that there be a relaxation of this section of the law, but I think that this is a matter of legal opinion, and it was our considered opinion that these hearings were necessary.

* * * * *

CHAIRMAN HOLIFIELD. So regardless of what has happened in the past, there does seem to be a meeting of minds on the problem of relaxation of what you consider from the legal point is a mandatory position in order that you might proceed administratively and in a less formal way?

MR. OLSON. That is right, Mr. Chairman. I think that everyone pretty well agrees that if you trust us now that it is high time we be given some discretion in this field.

license amendments. *1962 Hearing* 2-3.[22] Senator Pastore returned to that subject, stating (*id.* at 6):

> [Y]ou mention the proposed amendments to part 50 clarifying the extent to which licensees may make changes and conduct tests and experiments not specifically provided for in their operating licenses.
>
> How does this work? What has been the experience of the Commission under the rule of the *Vallecitos* case?

The AEC commissioner replied (*ibid.*):

> I feel that the course that we chose in the *Vallecitos* case of allowing the Division of Licensing and Regulation to make a determination as to whether an unreviewed safety issue was involved has cut out nine-tenths of the hearings. There is no question but what in our eagerness to give full compliance to the law, as we found it on the books, that we painted ourselves into a corner. We were holding more hearings than we could handle. It was not because we wanted to. It was because we thought we were obliged to under the law. I think as a result of the understanding that was reached after our hearings last year in which we found it was the will of the committee—that their intent with respect to the amendment that they had put into the law—was that they did not quite share our literal interpretation of it, I think we arrived at a very workable result. I think it has really taken the bottleneck out of our hearing process. We were holding hearings on every change—the technical specifications included entirely too many things—and I think that the changes that resulted from the *Vallecitos* case have been extremely helpful to everybody.

Shortly after the close of the Committee hearings, the AEC made final the regulations embodying the *Vallecitos* rule, 10 C.F.R. 50.59(e)(2) (1963) (27 Fed. Reg. 5493 (1962); J.A. 25). Then, on July 5, 1962, the Joint

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[22] The pendency of the proposed 10 C.F.R. 50.59 (1963) was expressly noted in a tabulation contained in an appendix to the hearing. *1962 Hearing* 109.

Committee reported out S. 3491, *supra*, and H.R. 12336, *supra*, the 1962 amendments to the Atomic Energy Act. S. Rep. No. 1677, 87th Cong., 2d Sess. (1962); H.R. Rep. No. 1966, 87th Cong., 2d Sess. (1962).[23] The proposed amendment to Section 189(a), which was ultimately enacted without change, limited the scope of the second sentence of that provision, providing for mandatory hearings, which had been added in 1957 to proceedings to issue a construction permit, and added what is now the third and fourth sentences of Section 189(a):

> In cases where such a construction permit has been issued following the holding of such a hearing, the Commission may, in the absence of a request therefor by any person whose interest may be affected, issue an operating license or an amendment to a construction permit or an amendment to an operating license without a hearing, but upon thirty days' notice and publication once in the Federal Register of its intent to do so. *The Commission may dispense with such thirty days' notice and publication with respect to any application for an amendment to a construction permit or an amendment to an operating license upon a determination by the Commission that the amendment involves no significant hazards consideration.*

S. Rep. No. 1677, *supra*, at 16-17 (emphasis deleted).

The Committee Reports described the amendments to Section 189(a) as follows:

> [T]he bill amends section 189 a. of the Atomic Energy Act of 1954 by relaxing the mandatory hearing requirement. Under the terms of this section, a hearing will be mandatory only on the application for issuance of a construction permit.
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> At the "Radiation Safety and Regulation" hearings in June 1961 and at the 1962 regulatory hearings, there was substantial unanimity of opinion that

[23] The Senate Report accompanied S. 3491, *supra*, and the House Report, the identical H.R. 12336, *supra*. The text of the two reports is essentially identical, each being the product of the Joint Committee on Atomic Energy.

the mandatory hearing requirement of the act with respect to power and testing facilities should be relaxed. The second hearing on the operating license was regarded, by most witnesses, as unnecessary and burdensome in the absence of bona fide intervention.

Accordingly, this section will eliminate the requirement for a mandatory hearing, except upon the application for a construction permit for a power or testing facility. Under this plan, the issuance of amendments to such construction permits, and the issuance of operating licenses and amendments to operating licenses, would be only after a 30-day public notice and an offer of hearing. In the absence of a request for a hearing, issuance of an amendment to a construction permit, or issuance of an operating license, or an amendment to an operating license, would be possible without formal proceedings, but on the public record. *It will also be possible for the Commission to dispense with the 30-day notice requirement where the application presents no "significant hazards consideration." This criterion is presently being applied by the Commission under the terms of AEC Regulation 50.59.*

This amendment, although relaxing the mandatory hearing requirement, should not prejudice the public interest in reactor safety determinations. A mandatory hearing will still be held at the critical point in reactor licensing—the construction permit stage—where the suitability of the site is to be judged. Succeeding regulatory actions will take place only upon publication and sufficient advance notice to afford an interested party the opportunity to intervene. In these succeeding stages, if a hearing is not held, the decision would still be on the public record and if an important safety question was involved, could be made by the Board.

The committee is cognizant of the provisional construction permit procedure which allows the issuance of a permit, subject to further research and development work, before becoming final. When this research and development work is directed toward the resolution of a difficult safety problem of unusual

public importance, it is expected that the Commission, on its own motion, would order a hearing before significant amendments or authorization for the final construction permit were issued. In any event, under the provisions of this section, an aggrieved party would be given the opportunity to intervene.

Finally, it is expected that the authority given AEC to dispense with notice and publication would be exercised with great care and only in those instances where the application presented no significant hazards consideration.

S. Rep. No. 1677, *supra*, at 7-8; H.R. Rep. No. 1966, *supra*, at 7-8 (emphasis added). The 1962 amendments, establishing the present text of Section 189(a), were passed in each house, with no significant debate, after the ranking members of the Joint Committee on Atomic Energy, Senator Pastore and Representative Holifield respectively, briefly, and in essentially identical terms, summarized the provisions of the bill. 108 Cong. Rec. 15746 (1962) (remarks of Sen. Pastore); 108 Cong. Rec. 16548 (1962) (remarks of Rep. Holifield).

d. On December 8, 1962, after providing notice and an opportunity for public comment (see 27 Fed. Reg. 10706 (1962)), the AEC promulgated changes in its regulations intended to effectuate the 1962 amendments (27 Fed. Reg. 12184 (1962)). The changes included a revision of 10 C.F.R. 50.58(b) (1963) to read as follows:

§ 50.58 Hearings and report of the Advisory Committee on Reactor Safeguards.

* * * * *

(b) The Commission will hold a hearing after 30 days' notice and publication once in the FEDERAL REGISTER on each application for a construction permit * * *. When a construction permit has been issued for such a facility following the holding of a public hearing and an application is made for an operating license or for an amendment to a construction permit or operating license, the Commission may hold a hearing after 30 days' notice and publication

> once in the FEDERAL REGISTER or, in the absence of a request therefor by any person whose interest may be affected, may issue an operating license or an amendment to a construction permit or operating license without a hearing, upon 30 days' notice and publication once in the FEDERAL REGISTER of its intent to do so. *If the Commission finds that no significant hazards consideration is presented by an application for an amendment to a construction permit or operating license, it may dispense with such notice and publication and may issue the amendment.*

27 Fed. Reg. 12186 (1962) (emphasis added).[24] This provision has been a part of the Commission's regulations continuously from that time through the present. See 10 C.F.R. 50.58(b).[25]

e. As the foregoing account of the legislative and administrative history behind Section 189(a) of the Atomic Energy Act should make painfully clear, the Commission's practices and interpretation of its hearing obligations are the product of continuous supervision by Congress, including on two occasions, statutory changes needed to achieve the desired balance between comprehensiveness and flexibility of regulation. And it should be equally clear that in enacting the 1962 amendments Congress deliberately adopted the Commission's practice of dispensing with an opportunity for a hearing prior to

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[24] We have been advised by the Nuclear Regulatory Commission that a copy of this provision was transmitted to the Joint Committee shortly before it was published. Letter from H. L. Price to Representative Holifield, Dec. 6, 1962.

[25] The separate provision to this effect first adopted, 10 C.F.R. 50.59(e)(2) (1963), was deleted in 1974 as part of a general simplification of the Commission's regulations. See 38 Fed. Reg. 22796 (1973); 39 Fed. Reg. 10554, 10555 (1974). Under the revised provision, 10 C.F.R. 50.59(c), currently in effect, changes in technical specifications are simply defined as license amendments subject to the amendment procedure prescribed in 10 C.F.R. 50.90 and the rules governing hearings on such amendments, at 10 C.F.R. 50.58(b).

action on an application for an amendment determined to involve "no significant hazards consideration." Although the language of the statute is, perhaps, unfortunately opaque in this regard, the intention of Congress is unmistakably revealed through the succession of reports and hearings in which the Joint Committee criticized the Commission's prior practice of holding hearings on every license amendment, however insignificant, the Commission's innovative response in the *Vallecitos* proceeding and the regulations, 10 C.F.R. 50.58 and 50.59, codifying that practice, and, most vividly, the House and Senate Reports which expressly incorporate by reference "AEC Regulation 50.59." S. Rep. No. 1677, *supra*, at 8; H.R. Rep. No. 1966, *supra*, at 8. It is difficult to imagine how legislative history could more strikingly reveal the intention of Congress.[26]

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[26] Congress' intention to empower the Commission to dispense with hearings on amendments determined to present no significant hazards consideration is corroborated by separate provisions of the 1962 amendments, amending Section 182(b) of the Act, 42 U.S.C. 2232(b), to underscore the Commission's discretion to decline to refer proposed license amendments to the Advisory Committee on Reactor Safeguards for review where the amendments are deemed routine. The Committee Reports describe the change in Section 182(b) as a "clarifying amendment" needed to overcome the Commission's unduly rigid interpretation of the previous terms of that section as requiring referral to the ACRS of all amendments no matter how routine, by "reliev[ing] * * * [the ACRS] of the necessity to review and report on amendments which do not raise significant safety questions * * *." S. Rep. No. 1677, *supra*, at 8-9; H.R. Rep. No. 1966, *supra*, at 8-9. Under the *Vallecitos* decision (1 A.E.C. at 543) and the newly adopted 10 C.F.R. 50.59(e)(1) and (2) (1963) (see pages 24-25, *supra*), the question whether a public hearing was required and the question whether a referral to the ACRS was required were both governed by the "no significant hazards" criterion. The Joint Committee adopted the same standard, noting that "where an amendment presents a significant hazards consideration, referral to the ACRS should follow." S. Rep. No. 1677, *supra*, at 9; H.R. Rep. No. 1966, *supra*, at 9. The Committee stressed the intimate relationship between the several provisions affecting the Commission's procedures

Legislative history cited by the court of appeals (80-1640 Pet. App. 17a-22a) does not, on examination, support its interpretation of Section 189(a). The court below relied primarily (*id.* at 17a-19a) upon the fact that the primary avowed purpose of the 1962 amendments to Section 189(a) was to eliminate the requirement of mandatory hearings with respect to uncontested applications for operating licenses and amendments to construction permits and operating licenses. While it is no doubt true that the preponderance of Congress' attention was directed to the distinct problem of limiting hearings in proceedings where no one wanted one, that objective was fully achieved by the limitation of the mandatory hearing requirement imposed by the second sentence of Section 189(a) to applications for initial construction permits, and the addition of the third sentence of Section 189(a), which underscores the Commission's authority to dispense with a hearing when none is requested in all other types of proceedings. The court of appeals' interpretation of the legislative history thus fails to ascribe any independent purpose or effect to the fourth sentence of Section 189(a), which was also added by the 1962 amendments, and which deals with the distinct problem of routine amendments, whether or not contested.

Perhaps because the Joint Committee was aware (see pages 22-24, 26-27 & note 22, *supra*) that the Commission had already dealt with the latter problem by regulation, the fourth sentence of Section 189(a) was given relatively little attention in the Joint Committee Report, and was not mentioned at all in the very brief summaries of the

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in the 1962 amendments, concluding that to the extent the amendments achieve the desired "results, further confidence will accrue in the decision to relax the requirements for mandatory hearings and referrals to the ACRS." *Ibid.* Accordingly, it is reasonable to assume that, in conformity with 10 C.F.R. 50.59 (1963), Congress intended that a finding of "no significant hazards consideration" authorize both the omission of a hearing and of referral to the ACRS, in the exercise of the Commission's discretion.

amendments given by Representative Holifield and Senator Pastore on the floor of their respective houses of Congress. See 108 Cong. Rec. 15746, 16548 (1962). But, however brief, the mention given the fourth sentence in the Report of the Joint Committee is nonetheless compelling—for it incorporates the Commission's new regulation, 10 C.F.R. 50.59 (1963), by reference.[27] In any event, the sparseness of the discussion of the fourth sentence of Section 189(a) in the legislative history cannot establish that Congress' sole purpose was to restrict the mandatory hearing required in uncontested cases. *Harrison* v. *PPG Industries, Inc.*, 446 U.S. 578, 592 (1980).

Other materials cited by the court of appeals in support of its conclusion are equally unavailing. The court quotes from the very portion of the Report of the Joint Committee on Atomic Energy we have quoted above pages 28-30, *supra*) to demonstrate that Congress did *not* intend to permit the Commission to dispense with a hearing in advance of its action upon an amendment involving no significant hazards consideration. But the court of appeals simply edited out the key sentence of that passage referring to "AEC Regulation 50.59," thereby reversing the significance of the Report. Similarly, the court of appeals' reliance (80-1640 Pet. App. 20a) on a passage from the 1961 JCAE Staff Report, *Improving the AEC Regulatory Process, supra*, is misplaced, for, read in context, the passage does not suggest that a hearing in

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[27] Stressing that the Committee Report literally invokes "the criterion" applied under 10 C.F.R. 50.59 (1963) (Br. in Opp. 10-11), respondents appear to suggest that Congress did not intend to adopt the actual procedure contemplated by that rule. In light of Congress' express citation of the Commission's regulation, the Joint Committee's awareness of the *Vallecitos* decision and its urgings that it be codified in a regulation, we think it incredible to suppose that Congress, while fully aware of the Commission's practices regarding *hearings* on amendments entailing no significant hazards consideration, and while engaged in clarifying the Commission's hearing obligations, meant effectively to disapprove the Commission's practices, as respondents suggest.

advance of Commission action is required.[28] Finally, the statements by Representative Holifield and Senator Pastore summarizing the 1962 amendments on the floor of each house cited by the court of appeals (80-1640 Pet. App. 21a) are simply inapposite because they refer only to the effect of the third sentence of Section 189(a). 108 Cong. Rec. 16548 (1962) (remarks of Rep. Holifield); *id.* at 15746 (remarks of Sen. Pastore).[29]

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[28] The passage involved is quoted at pages 20-21, *supra*. The JCAE staff's reference to preservation of "an opportunity to any interested party to intervene" is qualified by langauge, omitted by the court of appeals, which followed immediately: "with respect to any *new* matter raised by the action." *Improving the AEC Regulatory Process*, *supra*, Vol. I at 50 (emphasis added). So qualified, the inconsistency suggested by the court of appeals evaporates. In any event, contrary to the court of appeals' assumption, the opportunity to intervene does not necessarily require a hearing prior to initial action by the Commission (see 80-1640 Pet. App. 38a & n.6). Congress had good reason to be aware of the possibility of after-the-fact hearings, by reason of the *Power Reactor* case. See pages 17-18, *supra*. Although Congress responded to *Power Reactor* in 1957 by requiring hearings whether or not requested, the 1962 amendments limited the mandatory advance hearing requirement to proceedings on construction permit applications. See page 40, *infra*.

[29] Each legislator stated (*ibid.*):

> [T]he bill relaxes the mandatory hearing requirement in section 189 of the Atomic Energy Act. Under existing law, a hearing must be held on the application for a construction permit and on the application for an operating license. Under the terms of the committee's amendment, a hearing will be required only on the construction permit, which is really the critical point in reactor licensing—the point at which the suitability of the reactor site is determined. This amendment in no way limits the right of an interested party to intervene and request a hearing at some later stage, nor does it affect the right of the Commission to hold a hearing on its own motion.

Even if the closing sentence of these comments were read to refer to the fourth sentence of Section 189(a), as amended, it does not necessarily require that a hearing be held prior to action by the Commission. See page 34 note 28, *supra*, and page 40, *infra*.

2. Contrary to the court of appeals' suggestion (80-1640 Pet. App. 16a; see page 11, *supra*), the result reached below is not required by the language of Section 189(a). Although the last sentence of Section 189(a) does not expressly refer to omission of the opportunity for a hearing in advance of any action by the Commission, the context of that sentence removes any ambiguity. The sentence at issue provides (emphasis added):

> The Commission may dispense with *such thirty days' notice and publication* with respect to any application for an amendment to a construction permit or an amendment to an operating license upon a determination by the Commission that the amendment involves no significant hazards consideration.

The obvious referent for the language underscored is the preceding sentence which authorizes the Commission to dispense with a hearing in considering an application for an operating license or an amendment thereto or to a construction permit whenever none is requested, but which requires "thirty days' notice and publication once in the Federal Register of its intent to do so"—*i.e.* the Commission's intent to proceed without a hearing. 42 U.S.C. 2239(a). Inasmuch as the Commission is authorized under the fourth sentence to proceed without providing notice of its intent to issue an amendment without first holding a hearing whenever it determines that "no significant hazards consideration" is involved, it necessarily follows that the Commission is in fact entitled to dispense with a hearing.[30]

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[30] Respondents now suggest (Br. in Opp. 11, 12) that the fourth sentence of Section 189(a) is merely a qualification upon the third sentence, and that the fourth sentence accordingly merely authorizes the Commission to dispense with the notice of its intent to proceed without a hearing in cases where the third sentence of Section 189(a) authorizes the Commission to omit a hearing. That interpretation, which appears to differ from that adopted by the court of appeals (compare 80-1640 Pet. App. 16a-17a & n.20 with

In order to avoid this result, the court of appeals seemingly assumed (see note 31, *infra*), contrary to our reading, that the notice and publication which the Commission is authorized to omit under the final sentence of Section 189(a) does not include notice of the Commission's intent to proceed without first holding a hearing, but is only notice of the pendency of an amendment (see 80-1640 Pet. App. 15a-17a & n.20). Not only is this view at odds with the language of Section 189(a), but, as the court of appeals was obliged to acknowledge, under its interpretation "the third and fourth sentences of § 189(a), when read together, produce[] in theory a somewhat paradoxical result" for "it is difficult to imagine how a hearing can be requested when the NRC issues a license amendment without notice" (*id.* at 16a-17a n.20).[31] But accepting, *arguendo*, the court of appeals'

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id. at 20a n.24; see text, page 37 & note 31, *infra*) cannot be reconciled with the plain language of the fourth sentence which applies to "any" application for an amended operating license or construction permit found to involve no significant hazards consideration. Moreover, respondents' suggestion fails to account for the fact that the fourth sentence of Section 189(a), unlike the third sentence, does not apply to the initial issuance of an operating license. In any event, respondents' interpretation is at odds with the clear import of the legislative history, which adopts the Commission's practice under 10 C.F.R. 50.59 (1963), which was applicable whenever a no significant hazards determination was made, whether or not a hearing had been requested.

[31] The opinion below is not entirely consistent in its reading of the last sentence of Section 189(a). Elsewhere in the paragraph just quoted the court of appeals describes that sentence of Section 189(a) as authorizing "NRC * * * [to] issue a license amendment without providing 30 days' notice and publication in the Federal Register of its intent to do so," (80-1640 Pet. App. 17a n.20) while in yet another instance the opinion states "the fourth sentence * * * dispenses with 30 days' notice and publication in the Federal Register of the Commission's *intent to issue* a license amendment without a hearing" (*id.* at 20a n.24; emphasis in original). Nevertheless, it seems reasonably clear that the court assumed that it was notice of the pendency of an amendment (as to which a hearing right exists) which the Commission may

premises (see page 37 note 31, *supra*), its "resolution" of the paradox created by its decision (80-1640 Pet. App. 16a-17a n.20), is unpersuasive. Whether or not individuals manage to learn of agency plans in time to seek a hearing without any formal notice or publication, and whether or not some independent provision of law might impose a notice requirement of some kind as the court of appeals suggested—questions not presented here—it should be doubted that Congress deliberately sought to discourage individuals from learning of agency action in time meaningfully to exercise the right to a hearing, where such a right exists. The only tenable reading of the final sentence of Section 189(a) is that no hearing is required prior to approval of a license amendment in circumstances where the Commission is authorized to dispense with notice of its plans to act: the obvious purpose of a notice requirement is to protect and make meaningful a right to a hearing. *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950); *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 173-175 (1974).

In short, it is the court of appeals rather than the Commission which has strayed from the "plain language"

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omit under the fourth sentence, rather than notice of its intention to proceed without a hearing. It may be that the court of appeals envisioned that the notice required by the third sentence of Section 189(a) which the Commission was authorized to omit when acting under the fourth sentence of that section was a combined notice alerting the public to the pendency of an amendment, and providing 30 days' notice of the availability of a hearing and thus of the Commission's intention to proceed if none were to be requested. This interpretation of the third sentence of Section 189(a) is supported by the legislative history of the 1962 amendments to Section 189(a) (S. Rep. No. 1677, *supra*, at 8; H.R. Rep. No. 1966, *supra*, at 8 (see page 29, *supra*)), and has been adopted by the Commission. 10 C.F.R. 2.105(d), (e). But even so, the court of appeals overlooked the fact that one element of notice authorized to be omitted upon a finding of no significant hazards consideration was that aspect which signals the Commission's prerogative to proceed without a hearing.

ct Section 189(a), and thereby unnecessarily created a "paradoxical result." [32]

3. The court of appeals erroneously failed to defer to the Commission's long-standing interpretation of Section 189(a). As is demonstrated above, this "'contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new,'" was scrutinized and endorsed by Congress at its inception, and commands particular deference. *Power Reactor Co.* v. *Electricians, supra*, 367 U.S. at 408, quoting *Norwegian Nitrogen Products Co.* v. *United States*, 288 U.S. 294, 315 (1933); *CBS, Inc.* v. *FCC*, Nos. 80-207, *et al.* (July 1, 1981), slip op. 12-13; *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965).

The Commission has interpreted the no significant hazards criterion in a way which makes meaningful the right of public participation established by Section 189(a), by evaluating the need for a hearing in terms of whether the proposed license amendment entails hazards issues different in gravity, degree, or kind, from those

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[32] In addition to reliance upon "plain language" and legislative history analyses, the court of appeals rested its decision upon its prior decision in *Brooks* v. *Atomic Energy Commission, supra*, 476 F.2d at 927. But in *Brooks* the court of appeals noted that the Commission had failed to determine that the license amendment at issue entailed no significant hazards consideration, and accordingly could in no event rely on the last sentence of Section 189(a) to excuse its failure to afford an opportunity for a hearing. The *Brooks* panel's further suggestion that Section 189(a) did not allow omission of hearing where one is requested must accordingly be deemed *dictum*, or at most an alternative holding. There was, for that reason, no occasion for the Commission to seek further review of this aspect of *Brooks*. Moreover, language in *Union of Concerned Scientists* v. *Atomic Energy Commission, supra*, 499 F.2d at 1084 n.36, consistent with the Commission's interpretation of Section 189(a), militated against the conclusion that *Brooks* represented carefully considered *dictum* on this point, especially inasmuch as Judge Bazelon sat on both panels. In any event, nothing in *Brooks* adds any weight to the court of appeals' decision.

which have been previously evaluated.[33] Accordingly, the Commission's reading of Section 189(a) cannot result in denial of a hearing opportunity on an amendment entailing materially new hazards issues. And the Commission remains willing to entertain requests for a hearing filed after action upon a license amendment, thereby allowing an opportunity for members of the public to point out any novel hazards consideration believed to have been overlooked by the Commission. See note 33, *supra*.[34]

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[33] Proposed regulations codify this interpretation. 10 C.F.R. 50.91(b) would provide (45 Fed. Reg. 20493 (1980)):

> In making the determination that a proposed amendment to a license or a construction permit involves no significant hazards consideration, the Commission will consider whether operation of the facility in accordance with the proposed amendment would (1) involve a significant increase in the probability or consequences of an accident previously evaluated, (2) create the possibility of an accident of a type different from any evaluated previously, or (3) involve a significant reduction in a margin of safety.

A negative evaluation on all three scores is necessary before the Commission will reach a "no significant hazards" determination. Proposed 10 C.F.R. 50.91(c) (45 Fed. Reg. 20493 (1980)). The court of appeals expressly noted its view that these regulations are *ultra vires* insofar as they fail to require a hearing if requested prior to approval of an amendment (80-1640 Pet. App. 22a n.26).

The notice accompanying the proposed regulation also records the Commission's willingness to entertain requests for an after-the-fact hearing on amendments determined not to present a significant hazards consideration.

[34] The Commission's conclusion that an amendment involves no significant hazards consideration is of course subject to judicial review, as is the lawfulness of the accompanying substantive decision, under the provisions of the Administrative Procedure Act, 42 U.S.C. 2231, 2239(b). Amendments determined to entail no significant hazards considerations are not generally irreversible, thereby making meaningful the opportunity to seek an after-the-fact hearing and judicial review. Examples of amendments commonly found to entail no significant hazards consideration are set forth at 45 Fed. Reg. 20492 (1980). See also 80-1656 Pet. App. 63a-64a.

Unlike the Commission's "practical administrative construction" of the disputed statutory provision, which the court of appeals was bound to give substantial weight, *Power Reactor Co.* v. *Electricians, supra*, 367 U.S. at 408, the interpretation of Section 189(a) propounded by the court below would frustrate the purpose of the Atomic Energy Act by imposing substantial and novel administrative burdens on the Commission, which threaten the viability of the existing system of regulation of nuclear power production, power production itself, or both (see 80-1640 Pet. App. 31a-34a). The Nuclear Regulatory Commission has informed us that, in the past four years, it has approved more than 1600 amendments to nuclear power plant operating licenses which, it determined, entailed no significant hazards consideration. The annual average of more than 400 amendments per year reflects the detailed regulation of nuclear power plant operation carried out by the Commission. A nuclear power plant operating license, like that for the TMI-2 plant, includes hundreds of pages of highly detailed technical specifications. Any change in any of the technical specifications requires an amendment to the operating license. 10 C.F.R. 50.59(a)(1), (c). Minor changes must frequently be made to accommodate routine events in the operation of a nuclear power plant. For instance, when a power plant is refueled, an event which occurs approximately every eighteen months, the technical specifications must usually be adjusted to reflect the slightly different behavior of the fresh fuel placed in the reactor core. The need for a variety of other minor license changes, such as amendments extending the time allowed for conducting tests, frequently arise.

Under the court of appeals' decision, each of these minor license amendments must be held in abeyance if a hearing is requested, notwithstanding the fact that the Commission reaches a written, reasoned, judicially-reviewable determination that the amendment entails no

significant safety question.[35] As a practical matter, it would be difficult, and in some cases impossible, for the Commission to provide a prior hearing in time to complete processing of all of the required license amendments presenting no significant hazards consideration before the changes must be implemented. The Commission informs us that since the issuance of the decision below more than a score of nuclear power plants would have had to shut down or operate at reduced power if, by reason of a hearing request, they were not accorded in a timely fashion the authority sought in a license amendment which, the Commission concluded, presented no significant hazards consideration.

The court of appeals erred by failing to adopt the Commission's practical construction of Section 189(a) which permits interested parties to seek a hearing after a license amendment entailing no significant hazards consideration has been approved. The Commission's practice has been consistent with Congress' intentions in enacting Section 189(a) of the Atomic Energy Act, and the court of appeals' imposition of more exacting and burdensome requirements for administrative practice was impermissible. *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 543, 548 (1978); *Steadman* v. *SEC*, No. 79-1266 (Feb. 25, 1981), slip op. 13.

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[35] The potentially burdensome effect of the court of appeals' decision is magnified by what the dissenters from denial of rehearing en banc aptly labeled (80-1640 Pet. App. 40a) an "extraordinarily broad conception of what constitutes a request for a hearing," apparently embracing all "expressions of interest" (*id.* at 21a n.25). While the issue has not been placed before this Court, it seems clear, at the least, that the Commission may require a timely and reasonably definite request for a hearing as a precondition to exercise of the rights created by Section 189(a). *Costle* v. *Pacific Legal Foundation*, 445 U.S. 198 (1980).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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